No. 5634

# United States Circuit Court of Appeals

For The Ninth Circuit

FAIRBANKS MORSE & COMPANY, a Corporation,
*Appellant,*

—VS.—

LAKE UNION DRY DOCK & MACHINE WORKS, a Corporation,
*Appellee.*

UPON APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT FROM THE DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge*

## BRIEF OF APPELLEE

IRA BRONSON,
H. B. JONES,
ROBERT E. BRONSON,
*Attorneys for Appellee.*

614 Colman Building,
Seattle, Washington.

THE ARGUS, SEATTLE

FILED
MAR 4

No. 5634

# United States Circuit Court of Appeals

## For The Ninth Circuit

FAIRBANKS MORSE & COMPANY, a Corporation,
*Appellant,*

—VS.—

LAKE UNION DRY DOCK & MACHINE WORKS, a Corporation, *Appellee.*

UPON APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT FROM THE DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION
HONORABLE JEREMIAH NETERER, *Judge*

## BRIEF OF APPELLEE

IRA BRONSON,
H. B. JONES,
ROBERT E. BRONSON,
*Attorneys for Appellee.*

614 Colman Building,
Seattle, Washington.

THE ARGUS, SEATTLE

# United States Circuit Court of Appeals

### For The Ninth Circuit

| | |
|---|---|
| FAIRBANKS MORSE & COMPANY, a Corporation, *Appellant*,<br>—vs.—<br>LAKE UNION DRY DOCK & MACHINE WORKS, a Corporation, *Appellee*. | No. 5634 |

UPON APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT FROM THE DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge*

## BRIEF OF APPELLEE

This case having been tried to the court by stipulation and special findings made, there are, as we understand the rule, but three propositions which may now be urged upon this appeal:

1. Do the findings of fact support the judgment?
2. Was any error committed in the admission or exclusion of evidence?
3. Are the findings unsupported by any substantial evidence?

See

U. S. C. A. ~~Tr. 4,~~ Tit. 28, §§ 773, 875, 879;

*Societe Nouvelle D'Armement v. Barnaby*, 246 Fed 68 (9th Cir.);
*Maryland Casualty Co. v. Jones*, 27 Fed. (2nd) 521 (9th Cir.);
*Newlands v. Calaveras Mining & Mllg. Co.*, 28 Fed. (2nd) 89 (9th Cir.),

together with the cases therein cited.

No contention is made on this appeal that the facts found are insufficient to support the judgment. Only two assignments of error are urged, one relating to the admission of plaintiff's Exhibit 5, and the other challenging the sufficiency of the evidence.

It is doubtful whether the first assignment rests upon any sufficient objection and exception to present it upon this appeal. At the opening of the case appellant objected to plaintiff's Exhibit 1 as incompetent, irrelevant and immaterial, not tending to prove or relating to any of the issues of the case, and never having been brought to the knowledge of appellant (Tr. 13). Plaintiff's Exhibit 2 was unchallenged (Tr. 14). Objection was then taken to evidence of statements made by appellant's employee, Kuppler, on the ground that there was no showing that such employee had authority to make any statements, but no exception was preserved upon the admission of this evidence (Tr. 15). To plaintiff's Exhibit 3 the appellant made "the same objections heretofore made," and upon the offer of plaintiff's Exhibit 4 asked to "have these objections run to all of these documents" (Tr. 16). Plaintiff's Exhibit 5, the admission of which is the only subject of the first assignment of error, was offered together with Exhibits 6 and 7,

upon which appellant said, "Continue these same objections the same as before and exceptions to the court's rulings" (Tr. 19). It is uncertain just what objection was sought to be preserved to the admission of plaintiff's Exhibit 5. Appellant endeavors by reference back to connect up its objections to the first exhibit as applicable to Exhibit 5, but such reference is by no means clear. It may as well have referred to the objections to the admission of the oral statements of defendant's agent, which were put on an entirely different ground.

A general, vague or indefinite objection to the evidence is insufficient to preserve the question on appeal. The specific grounds or reason for the objection as applied to the particular evidence must be pointed out. See U. S. C. A. Tit. 28, Sec. 776, Note 43, *Examiner Printing Co. v. Aston*, 238 Fed. 459 (9th Cir.). We question therefore whether there has been proper preservation of this ground of objection to entitle it to consideration on appeal.

If, however, it is properly before the court, the objection is nevertheless untenable. This suit was brought to recover upon an obligation in the form of a trade acceptance alleged to have been made, executed and delivered by the appellant. Plaintiff's Exhibit 5 is the document relied upon. It was admittedly executed and delivered in appellant's name by the manager of its business at Seattle (Tr. 13), and it was therefore upon its face decidedly material and relevant to the issues of the case, and having been executed and delivered by this general agent of the appellant company it could scarcely have been said not

to have been brought to the knowledge of the appellant.

It is not pointed out in appellant's brief how the objection applies to this exhibit. It does not raise the ultimate question of appellant's liability on the instrument as depending on the authority of its agent, or its ratification or adoption of the transaction or estoppel to repudiate the same, and any question of want of authorization or non-liability of the appellant thereon will properly come within the discussion of assignment No. II.

In treating the second assignment of error appellant is apparently expecting this court to weigh the evidence and come to a conclusion different from that reached by the trial court upon questions of fact as to which the evidence is in dispute. It sets forth fragmentary and disconnected excerpts from the evidence, presenting a confused jumble of assorted statements unrelated in sequence, which simply create confusion and uncertainty, without showing the situation that the court had before it as a basis for its findings. We shall therefore undertake to present the picture in a clearer light, taking into consideration, as we may under the rule, all of the facts or proper inferences therefrom which any of the evidence in the case tends to establish.

The appellee, Lake Union Dry Dock & Machine Works, engaged in the ship repair business at Seattle, in the fall of 1926, made certain repairs to the Motor Ship "Ethel M. Sterling" (Tr. 22). This work was performed pursuant to contract dated October 14, 1926 (Pl. Ex. 2, Tr. 56), under which final payment

was not due until March 1, 1927, and insurance was agreed to be carried on the vessel to protect appellee against loss. The appellant, which was engaged in the manufacture, sale and installation of engines, pumps, electrical equipment and the like (Tr. 44), also furnished machinery, equipment and supplies to the "Ethel M. Sterling" to the extent of approximately Fifty Thousand Dollars ($50,000.00), on which account they received a mortgage for thirty thousand eight hundred dollars ($30,800.00) under date of December 11, 1926, while the balance of approximately twenty thousand dollars ($20,000.00) was carried as an open account (Tr. 15, 65).

Mr. Walter R. Kuppler had been the credit manager of the appellant at Seattle for about fifteen years prior to January 1, 1927 (Tr. 24), and upon the organization of the Sterling Steamship Company, owner of the vessel, he became a trustee and treasurer of the corporation so that he could watch the funds (Tr. 25). His position in this respect was known at least to the local manager of the appellant (Tr. 26), and was always considered by him as being for the protection of the interests of the appellant (Tr. 43). The contract under which appellee performed its work (Pl. Ex. 2) was executed by Mr. Kuppler as treasurer. On April 6, 1927, Mr. Kuppler wrote to the appellee regarding the balance due it, then amounting to eight thousand dollars ($8000.00), inviting its assent to receive payment of this balance, four thousand dollars ($4000.00) on or before August 10, 1927, and four thousand dollars ($4000.00) on or before December 10, 1927 (Pl. Ex. 1, Tr. 54).

This communication, while on the letterhead of the Sterling Steamship Company, was undoubtedly written in the office of the appellant, as it will be noted that the initials appearing at the end thereof, "WRK-GE", are the same as those appearing on plaintiff's Exhibit 3 and defendant's Exhibit A-2, which are admittedly communications from appellant's office. It appears, therefore, that Mr. Kuppler was not only acting for the appellant in serving as an officer and trustee of the Sterling Steamship Company, but was carrying out such activities through the appellant's own office.

Upon receipt of this communication of April 6, 1927, the appellee's president and secretary called upon Mr. Kuppler at the appellant's office in Seattle and stated that it was necessary that its account be paid not later than June 20 (Tr. 13-14, 25, 32). Mr. Kuppler represented to them that the appellant was looking after the vessel and its operation and had an interest in the freight moneys, that the ship was then on its way to Galveston and that the appellee need not feel concerned because the appellant, which had a large claim against the ship, recognized that appellee's claim was superior to its own and would ultimately have to be paid (Tr. 15, 26, 28, 32). Mr. Kuppler said he would see what could be done about insurance coverage (Tr. 15), and the matter rested there until May 19th, when the appellant wrote to the appellee (Pl. Ex. 3, Tr. 57), stating that in accordance with this conversation it had placed $20,000.00 additional insurance on the "Ethel M. Sterling" for protection of itself and the appellee, and

enclosing a copy of the insurance coverage. To this communication appellee replied on May 20th, through its attorney (Tr. 58), stating that the arrangement was unsatisfactory and that it would insist on being assured of the receipt of its money not later than June 20th.

The representatives of appellee again called upon Mr. Kuppler about the last of May, having ascertained that the vessel was due to leave Galveston on June 4th, and notified him that appellee proposed to libel the vessel there for its claim unless some satisfactory adjustment was made (Tr. 16, 33). Mr. Kuppler requested them not to libel the ship, saying that appellant could not afford to have that happen and would have to take care of the matter in some way and thereupon took the parties in to see Mr. Miller, the manager of appellant's Seattle branch, and explained the situation to him. Some controversy occurred as to whether the appellee was unduly insistent on its rights, which is not material here. It was made clear that the appellee proposed to libel the vessel at once before it could leave Galveston unless its claim should be taken care of in some satisfactory way (Tr. 17, 25, 33). Mr. Miller and Mr. Kuppler both recognized that appellee's claim was superior to that of appellant, having been so advised by their attorney (Tr. 26, 28, 48), and Mr. Miller finally stated in effect that the appellant would have to take care of the matter and requested time within which to take it up with his people and it was agreed that it should go over for two days (Tr. 17, 33, 46-48).

Prior to this time and under date of May 21, 1927,

Mr. Miller had reported to A. W. Thompson, Pacific Coast manager for the appellant at Los Angeles, setting forth in general the financial status of the "Ethel M. Sterling" and reporting on her movements and stating that

> "We have succeeded in having the charter assigned to us. We will, therefore, receive this money, and with our libel claim, we should be able to have assigned to us any future charters." (Pl. Ex. 9, Tr. 63-66)

Immediately following the conference last referred to Mr. Miller wired to Mr. Thompson (Pl. Ex. 8, Tr. 63) setting forth that appellee threatened to libel the ship, which would cause the appellant heavy loss, and suggesting that appellant assume the payment of this bill. To this message Mr. Thompson replied by a telegram (Pl. Ex. 10) asking if their mortgage did not have priority over appellee's claim. Miller answered that appellee's claim ante-dated their mortgage and that their attorneys advised that the claim was prior thereto (Tr. 66-67). Thereupon, Thompson wired Miller (Pl. Ex. 8, Tr. 62) that the matter "must be left to your good judgment," warning him that they "must not under any circumstances jeopardize the sum now involved," but suggesting that they give a guarantee of payment in preference to laying out the cash.

Upon receipt of this telegram Mr. Kuppler got in touch with the appellee's representatives and advised them that appellant was willing to guarantee payment of the claim and it was arranged between them that the matter should be handled in such form as would

be acceptable to the First National Bank of Seattle, with which both parties did business, so as to enable the appellee to raise funds thereon. The appellant wanted to avoid paying out the cash immediately and the appellee wanted to be in a position to realize on the claim and to this end the bank suggested handling the matter by a trade acceptance. This suggestion was communicated to Mr. Kuppler and at his request referred to Mr. Josiah Thomas, attorney for the appellant, who approved this method of handling the transaction (Tr. 18, 27, 33, 41, 42).

Thereupon, appellee's attorney prepared a trade acceptance (Pl. Ex. 5), an assignment to the appellant of its claim (Pl. Ex. 7), and a letter to the First National Bank (Pl. Ex. 6), transmitting to it the said assignment with directions to deliver same to the appellant upon the payment of the trade acceptance, and took these instruments to Mr. Kuppler at appellant's office (Tr. 18-19, 27-29). Mr. Kuppler checked over the documents and O.K.'d the trade acceptance and then took appellee's attorney in to Mr. Miller, and explained to the latter the method adopted for handling the situation. To use Mr. Miller's words as given in the bill of exceptions:

> "Kuppler said our attorney advised this trade acceptance was the right way to handle the situation. I then called up Mr. Thomas on the phone and asked him about it and he said he understood the situation and that it was the proper thing to do. After he so advised me, I signed it." (Tr. 49)

At the same time protest was made by the appellant

against the placing of the assignment in escrow with the bank and it was thereupon at appellant's request turned over to it absolutely and remained in its possession until the date of trial (Tr. 19, 20, 27, 28).

The appellee thereupon abandoned any further claims against the vessel and shortly afterwards at the appellant's request released its interest in the insurance, as set forth in plaintiff's exhibit 3. The trade acceptance was discounted with the First National Bank, but upon maturity was dishonored and payment refused by the appellant (Tr. 20).

The "Ethel M. Sterling" sailed from Galveston in due course, passing through the Panama Canal about June 22nd, 1927 (Pl. Ex. 13, Tr. 68), and upon arrival at Hawaii was libeled by appellant on account of its own claims and bought in by it in such proceeding (Tr. 22).

In the meantime, under date of June 10, 1927, Mr. Kuppler for the Seattle branch, wrote to appellant's head office a thorough report on the transaction (Pl. Ex. A-2), and we particularly call to the court's attention that portion of that letter appearing on pages 70, 71 and the first half of 72 of the transcript. This was received by the appellant at its head office in Chicago on June 14th, and thereupon considered by the president, general credit manager, vice president and treasurer, and secretary (Tr. 39). On the following day a telegram was sent from the head office to Mr. Kuppler at the Seattle branch (Pl. Ex. 11, Tr. 67), referring to this letter and directing the placing of additional insurance to protect appellant's interest in the "Ethel M. Sterling." No comment was

made on the arrangement regarding appellee's claim at this time, or until July 7, 1927, when a letter was written, stating that Fairbanks Morse & Co. had "just learned" of the transaction, and that it thereby repudiated the act of Mr. Miller in giving the acceptance (Def. Ex. A-4, Tr. 79-80). The assignment which had been delivered to the appellant was not returned nor was there any reinstatement of the insurance which had theretofore been placed in favor of the appellee and which it had consented might be cancelled.

A few words may be added respecting the authority of Mr. Miller, the appellant's manager at Seattle. He had been acting in this capacity for some eight years at the time of this transaction (Tr. 43), having charge of territory comprising Washington, Oregon, Idaho, part of Montana and all of Alaska (Tr. 25), and having an organization consisting of himself as manager, a credit manager, Mr. Kuppler, who had been with the defendant in that capacity for about fifteen years (Tr. 24, 25), and various departments with department managers and salesmen covering the territory. It was his duty to see that the goods manufactured by the appellant were sold, installed and serviced and the accounts collected (Tr. 44). There was no written record of his authority (Tr. 38). Any limitation thereon was contained only in the company's records which were kept at Chicago (Tr. 40), and was unknown to the appellee. Mr. Miller had authority in the matter of contracts up to $5000.00, and above that sum they were referred to Mr. A. W. Thompson at Los Angeles, the manager of the appellant for the entire Pacific Coast, whose jurisdiction

extended as far east as Salt Lake City (Tr. 25, 31 and 44).

From the correspondence comprised in the exhibits it appears that it was customary for the local office to report to Mr. Thompson upon all matters of general importance and look to him for its authority and direction.

While the local branch had not previously purchased any accounts as large as this one, it had taken similar assignments of smaller accounts to protect its interest in other boats (Tr. 29). Mr. Miller was also in the habit of negotiating municipal warrants, many of which were handled through the bank every month (Tr. 30).

That the local branch had large responsibility and authority in the carrying on of the business is clearly apparent from the various reports and communications contained in this record relating to this particular case of its installation of engines and equipment in the "Ethel M. Sterling." Here was a matter of sales amounting to $50,000.00, which apparently was handled entirely by the Seattle office on its own responsibility, without more than a report to the Pacific Coast manager (Tr. 63-66; 70-79). Its contract with the Sterling Steamship Company for the installation of these engines was negotiated and executed on behalf of the appellant by Mr. Whitehead, a local salesman (Tr. 45, 46). It was the duty of the local office to pass on the credits of its customers and make the collections (Tr. 45). It permitted its credit manager to become the trustee and treasurer of the Sterling Steamship Company (Tr. 26), and to carry on cor-

respondence from its office in the name of that company (Pl. Ex. 1). The additional $20,000.00 insurance mentioned in plaintiff's Exhibit 3 was effected through the local office, and it was handling and collecting on the charters and in fact practically managing the operation of the vessel itself at this time (Pl. Ex. 9, See particularly Tr. 65-66). It was making advances for the operation of the vessel, which for the month preceding June 10, 1927, amounted to $8534.38 (Pl. Ex. A-2, Tr. 70). It was contracting for the cargo for the vessel from Galveston (Tr. 76), and it expected to advance further sums on account of the voyage to Honolulu and was endeavoring to arrange for a return cargo (Tr. 78). It was, in fact, acting as the operating manager of the vessel.

On June 22, 1927, when the "Ethel M. Sterling" arrived at Colon, it called on the Seattle office for an advance of twenty-five hundred dollars which the Seattle branch applied to the Pacific Coast manager to furnish (Pl. Ex. 13, Tr. 68).

The submission of these matters by the Seattle branch to the Pacific Coast manager and the acceptance of the latter's direction was apparently recognized by the appellant's organization as the regular and proper method of handling such business, and no word of complaint or disapproval thereof is contained in the record, nor is there any denial or disavowal of Mr. Thompson's authority to act for the appellant under such circumstances.

All of these facts and surrounding circumstances were before the trial court and support his conclusion as expressed in his opinion (Suppl. Tr. 6), and in

finding No. 5 (Suppl. Tr. 9) that Miller had the apparent and necessary authority in connection with his management of appellant's business to purchase appellee's claim as incident to and for the protection of appellant's interest in the vessel, and that Mr. Thompson had the authority to and did expressly authorize Miller to handle the transaction in the way that was done. All of this evidence furnishes substantial support for the court's finding in this respect.

The appellant has stated a number of general propositions relating to agency with which for the most part we have no complaint, except that they are not applicable to the present case. The question of the apparent and express authority under which Miller acted in executing this trade acceptance was one of fact. The court has found that it existed and there being substantial evidence to support such finding there is no question of law involved. However, should authority be thought necessary, we call particular attention to the decision of this court in *Cox v. Robinson*, 82 Fed. 277, an appeal from a decision by Judge Hanford, in which the facts are, in certain respects, very similar to this case. It was there said:

> "The acting head of a corporation, whether it is president, vice-president, cashier, or general manager, through whom and by whom the general and usual affairs of the corporation are transacted which custom or necessity has imposed upon the officer,—such act being incident to the execution of the trust imposed in him,—may be performed by him without express authority; and in such case it is immaterial whether

> such authority exists by virtue of the office or is imposed by the course of business as conducted by the corporation."

And we call particular attention to the quotation at page 284 from *Merchants Bank v. State Bank*, 10 Wall. 604, 644, announcing the principles that should govern such dealings, and holding that the question of authority or estoppel is for the jury, or in this case, the court.

Under the decisions of the State of Washington and probably also under Sec. 3410 of Remington's Compiled Statutes (app. br. p. 6) the powers of a corporate agent regarding negotiable paper are to be determined by the same rules as apply to other transactions.

The Supreme Court of Washington has held in a long line of cases that where one has been placed in the position of manager by a corporation and executes a contract on its behalf that is within its corporate powers, the presumption is that he acted with due authority and the burden is on the corporation to prove the contrary. This rule applies to negotiable instruments as well as other contracts.

> *Carrigan v. Improvement Co.*, 6 Wash. 590;
> *Citizens National Bank v. Wintler*, 14 Wash. 558;
> *Parr v. Pac. Storage Warehouse*, 124 Wash. 26.

In *Kitzmiller v. Pacific Coast and Norway Packing Co.*, 90 Wash. 357, the court said (p. 362):

> "As 'general manager' without any limitations or restrictions as to his express authority,

he had implied authority to
the corporation could lawfull
scope of its business."

And in *Willis v. MacDougall*
Wash. 330, where the same rule
was held that the agent's denial o
not sufficient to rebut the presum
question of authority was still o
determination of the jury under
circumstances.

The same rule was applied to t
manager of a foreign corporation
*ings & Loan Association v. Breier*

The appellant is also liable in t
tion and estoppel. It admitted t
notice of the transaction as set
letter (Def. Ex. A-2) on June 1
plied by telegram on June 15th (
no exception to the issuance of t
and no steps to repudiate it until
of more than three weeks. The a
time had given up its libel claim
vessel to proceed and she had t

against the ship, the appellant retaining t
ment until the time of trial. These were
tions which the appellant was bound to
make any repudiation effective and withou
was incomplete.

In *Albright v. Sunset Motors*, 148 Was
was held that where one had assigned a c
corporation, the retention of the assignm
disapproval of the transaction by the co
amounted to a ratification. It was conte
there was no more obligation upon the corp
return the assigned claim than upon the a
request its return:

> "But we think this mistakes the dut
> parties. As matters stood, it was the
> tion's duty to act, since the agreement
> submitted to it for ratification." (p. 3

Finally, the appellant has received the f
of the assignment of appellee's claim and it
grossly unjust to permit it to escape its
It was admitted time after time that this
superior to the appellant's mortgage a

*Stilwell v. Merriam Co.*, 127 Wash. 116;
*Riverside Finance Co. v. Otis Automatic Train Control*, 140 Wash. 495.

"It is not in harmony with any sound code of ethics, and is not the policy of the law, to permit a solvent corporation to obtain and appropriate the property of another on the credit of its solvency, and then escape responsibility by hiding behind some impecunious office of such company."

*Rowland v. Carroll Loan & Investment Co.*, 44 Wash. 413;
*Livieratus v. Commonwealth Security Co.*, 57 Wash. 376.

We do not charge that appellant deliberately schemed to induce this claimant to forego its certain rights, relying upon its contract made in good faith with appellant's representative, and then when the subject matter had been gotten as far beyond practical control as possible, to appropriate the whole thereof to his own claim, leaving the appellee to bear the entire loss through a disavowal of the acts of its agent from which it had received the benefit. But regardless of appellant's intent, the result is the same and the appellee should be protected against such an injustice.

We submit therefore that the court's findings that the execution of the trade acceptance was authorized, both expressly and impliedly, and within the apparent scope of the agent's authority, is supported by substantial evidence and not now open to question, and that in any event the appellant is liable through hav-

ing ratified the transaction by not promptly disavowing the same, to the prejudice of the appellee, and is estopped to deny it by having retained the benefits thereof.

Respectfully submitted,

IRA BRONSON,
H. B. JONES,
ROBERT E. BRONSON,
*Attorneys for Appellee.*